

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, : CRIM No. 94-173-1
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 :
 :
ALICIA HATCHER, : (CIVIL NO. 97-3126)

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

November 6, 1997

Claiming ineffective assistance of counsel, petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. Because petitioner's motion was filed after the expiration of the limitations period, it was untimely and will be denied.

Factual and Procedural History

On September 19, 1994, petitioner Alicia Hatcher (Hatcher) was convicted of conspiracy to distribute cocaine, and possession with intent to distribute cocaine. The jury found that Hatcher had been a courier transporting cocaine from Tyria Ekwensi ("Ekwensi") in Philadelphia to Carlton Love ("Love") in Detroit, and transmitting payment from Love to Ekwensi. The conviction was affirmed on appeal on November 2, 1995. On May 5, 1997, Hatcher filed a petition pursuant to 28 U.S.C. § 2255. Because the petition was not in the proper form, the court ordered that the clerk furnish the proper forms, and the defendant complete and return them. Defendant, filing the completed petition under § 2255 on June 10, 1997, claimed ineffective assistance of counsel for conflict of interest, failure to interview possible witnesses, failure to allow Hatcher to testify on her own behalf,

and pursuit of useless cross-examination.

Discussion

The Anti-Terrorism and Effective Death Penalty Act of 1996, ("AEDPA"), which was signed by the President on April 24, 1996, amended the habeas corpus statute to include a limitations period. Prior to the passage of the AEDPA, a petitioner had the right to file a § 2255 petition at any time after a conviction became final. See, Lonchar v. Thomas, U.S. (1996). Persons in custody pursuant to the judgment of a federal court are now required to file any petition for habeas relief in federal court within one year of one of four events:

- (A) the date on which the judgment of conviction becomes final;
 - (B) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
 - (C) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
- 28 U.S.C. § 2255 (1997).

Because of the possible constitutional ramifications of applying the AEDPA to cases which became final prior to its passage, this court, like the vast majority of courts, has chosen to apply the limitations period prospectively, allowing prisoners a "grace period" following the effective date of April 24, 1996, in which to file habeas petitions. If the triggering event in

petitioner's case occurred prior to April 24, 1996, courts in this district have given petitioners a reasonable period in which to file their petition. See, U.S. v. Ortiz, 1997 WL 214934 (E.D. Pa. April 28, 1997) (finding that petition was timely since it was filed within ten months after the effective date of the AEDPA); U.S. v. Santiago, 1997 WL 400028 (E.D. Pa. July 10, 1997)(holding that "because petitioner filed his motion within one year after the AEDPA's enactment," petitioner's motion was filed within a reasonable time and was not barred). See, also, Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996) (allowing AEDPA's time limit to run from date prior to enactment "would be entirely unfair and a severe instance of retroactivity"); Lindh v. Murphy, 96 F.3d at 866 ("Courts treat a reduction in the statute of limitations as a rule for new cases only."); United States v. Lopez, 100 F.3d 113, 116-17 (10th Cir. 1996) (rejecting retroactive application of one-year limitations period); but see Clarke v. United States, 955 F. Supp. 593, 597 (E.D. Va. 1997) (holding that one-year limitation period may be applied retroactively to deny motion filed over six years after petitioner's conviction became final).

Even with the grant of a reasonable "grace period," circuit courts have uniformly held that the reasonable period under 28 U.S.C. § 2255 does not exceed one year from the date the AEDPA took effect on April 24, 1996, for a habeas corpus petition by petitioners whose conviction became final prior to that date. See Calderon v. U.S. District Court for the Central District of

California, 112 F.3d 386, 389 (9th Cir. 1997) (concluding that "AEDPA's one-year time limit did not begin to run . . . prior to the statute's date of enactment"); U.S. v. Simmonds, 111 F.3d 737, 745-46 (10th Cir. 1997); Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997); and Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir.) (en banc), rev'd. on other grounds, --- U.S. ---, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Accordingly, habeas petitioners whose convictions became final on or before April 24, 1996, must have filed their § 2255 motions before April 24, 1997. See, Simmons, 111 F.3d at 746; Lindh v. Murphy, 96 F.3d at 866 (finding that "the 'reasonable time' after April 24, 1996, and the one year statutory period coalesce[.]").

Here, petitioner's conviction became final on November 2, 1995, about six months prior to the effective date of the AEDPA. Petitioner waited until May 5, 1997 to file this § 2255 motion.¹ Since petitioner did not file the instant motion for habeas relief until after the expiration of the one-year limitation provided in the AEDPA, the Court finds that the instant petition

¹ Petitioner's letter, which the Clerk of Court converted into a habeas petition, was dated April 18. It was received by the Clerk of Court on May 5, 1997. The court instructed Hatcher that if she wished to submit a § 2255 petition, she should fill out the proper forms. Her proper forms were received on June 10, 1997. The government argues that it is this latter date that should be used for calculating whether the motion was timely. The court finds that her petition was filed when received by the Clerk of Court on May 5, 1997. The date on Hatcher's letter is not relevant, because the relevant date is when the petition was "received in this court and filed." Burns v. Morton, 970 F. Supp. 373, 376 (D.N.J. 1997) (finding that "Congress [did not] intend[to create a] 'mailbox' provision in the AEDPA.").

is not timely filed, and will be denied.

Even if it were timely filed, this court would deny Hatcher's petition on the merits. The four bases for her ineffective assistance of counsel claim are: conflict of interest, failure to investigate Hatcher's claims, failure to interview possible witnesses, and pursuit of useless cross-examination.

Defendant's ineffectiveness of counsel claim is controlled by Strickland v. Washington, 446 U.S. 668 (1984). To establish ineffective assistance of counsel, defendant must show both: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant; so that the result was in an unreliable or fundamentally unfair outcome of the proceeding. Id. at 687. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 687. A defendant must overcome the presumption that, under the circumstances, counsel's actions might be considered sound strategy. Id. at 689.

First, the conflict of interest argument is meritless. Hatcher and her mother, Geraldine Hatcher, were tried together, and were originally represented by one attorney, James Thomas ("Thomas"). Because of the conflict of interest, the court required defendants to each have her own attorney. Thomas continued to represent Hatcher, and Geraldine Hatcher retained David Cripps, ("Cripps"), an associate of Mr. Thomas. Hatcher claims that Cripps had a conflict of interest because Cripps did

nothing, Thomas was really the counsel for both defendants, and Cripps "merely made an appearance without knowledge of the case." Hatcher "has no standing to make such a conflict of interest claim since [Mr. Cripps] was not [her] attorney." United States v. Merlino, 1997 WL 597885, at *8 (E.D. Pa. Sept 17, 1997). There is no allegation that Hatcher's attorney, James Thomas, had a conflict of interest. Hatcher "cannot bring an ineffective assistance of counsel claim against [Cripps] since he was not [her] attorney." Id. at *11.

Second, the failure to call certain witnesses does not constitute ineffective assistance of counsel. Thomas's failure to call a co-defendant to the stand does not constitute cause. Thomas could not have compelled Geraldine Hatcher to testify, and it is unlikely she would have voluntarily done so, particularly since Geraldine Hatcher did not testify on her own behalf and, had she been called, she would have been subject to cross examination regarding her own role in the offense. Thomas's failure to call three other unnamed witnesses does not constitute prejudice. Hatcher does not assert what these other witnesses might have said, or how their testimony would have impacted the outcome.

Third, Hatcher's allegation that her counsel failed to allow her to testify is meritless. While she has a constitutional right to testify which only she can relinquish, Rock v. Arkansas, 483 U.S. 44 (1987); United States v. Pennycooke, 65 F.3d 9, 11 (3d Cir. 1995), she is presumed to assent to her attorney's

tactical decision not to call her to testify. United States v. Joelson, 7 F.3d 174 (9th Cir.) cert denied, 510 U.S. 1019 (1993). Hatcher has cited nothing that would overturn the dual presumptions that counsel's decisions constituted sound trial strategy; and that counsel and defendant discussed the defendant's right to testify and defendant voluntarily and intelligently waived that right. Pennycooke 65 F.3d at 12-13. In order to demonstrate prejudice, Hatcher must allege more than just a bald assertion that she was not allowed to testify, Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991), including some specifics as to what the testimony would have been. Granada v. U.S., 51 F.3d 82, 85 (7th Cir. 1995). Defendant makes no assertions about what she would have said had she been called. Her bare assertion is insufficient to set aside the outcome.

Fourth, Hatcher alleges that counsel pursued useless cross-examination. She is really arguing that counsel was unprepared and insufficiently knowledgeable of the facts and law surrounding the indictment. This argument is belied by counsel's effective advocacy at trial, successfully objecting to certain evidence, undermining the credibility of several government witnesses, and obtaining not guilty verdicts on two of the four counts. Hatcher's argument that Thomas was not prepared is also undermined by her own petition, in which she asserts that her counsel did all the work for the trial, and really represented both defendants.

Even were this court to reach the merits, these claims of

ineffective assistance of counsel would be denied. However, because the petition was not filed within the relevant limitations period, it was not timely, and will be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CRIM No. 94-173-1
	:	
v.	:	
	:	
ALICIA HATCHER,	:	(CIVIL NO. 97-3126)

ORDER

AND NOW this 6th day of November, 1997, upon consideration of defendant's Motion to Vacate, Set Aside, or Correct Sentence under 18 U.S.C. § 2255, the government's response in opposition thereto, and defendant's "Response to Government's Opposition," it is **ORDERED** that:

Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 18 U.S.C. § 2255 is **DENIED** without hearing.

Norma L. Shapiro, J